

ATTORNEY GENERAL
DAVID H. SOUTER

THE STATE OF NEW HAMPSHIRE

ASSISTANT ATTORNEYS
GENERAL

DEPUTY ATTORNEY GENERAL
THOMAS D. RATH

ATTORNEYS

ANNE E. CACWIN
DEBORAH J. COOPER
ANDREW R. GRAINGER
DAVID W. MARSHALL
RICHARD B. MICHAUD
EDWARD W. STEWART, Jr.
JUDITH MILLER KASPER
E. TUPPER KINDER
MARK H. PUFFER



THE ATTORNEY GENERAL

STATE HOUSE ANNEX, ROOM 208
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301

THOMAS B. WINGATE
ROBERT V. JOHNSON, II
EDWARD A. HAFFER
JOHN L. AHLGREN
GREGORY H. SMITH
JOHN T. PAPPAS
W. JOHN FUNK
JOHN S. KITCHEN
JAMES L. KRUSE
EDWARD N. DAMON
JAMES E. MORRIS
JAMES C. SARGENT, Jr.
WILBUR A. GLAHN, III
PETER W. HEED
RICHARD B. McNAMARA

November 10, 1977

His Excellency, Meldrim Thomson, Jr.
Governor of the State of New Hampshire
State House
Concord, New Hampshire 03301

Your Excellency:

Recently you requested our opinion on the question of whether the President of Keene State College, as an ex-officio member of the Board of Trustees of the University of New Hampshire, or the members of the Board of Trustees could appoint another to serve on the Board in the President's absence and thereby exercise his statutory duties, in particular the election of the chairman of the Board pursuant to RSA 187:5-a (Supp. 1975). Our opinion is that neither the President nor the members of the Board may appoint another to serve in the President's absence.

The President of Keene State College is appointed to the Board pursuant to statute which provides that one of the seven ex-officio members shall be the President of Keene State College. RSA 187:5, I (Supp. 1975). This provision does not provide for anyone to act in his absence as is provided, for example, in the case of the Attorney General where the Deputy Attorney General may act as Attorney General "whenever the latter is absent or unable to act from any cause. . ." (RSA 7:3 (Supp. 1975)) or in the case of a department head where the Governor and Council may appoint a person to perform his duties in "case of temporary inability, by reason of illness or otherwise. . . ." RSA 4:5. Other statutory provisions concerning the appointment of individuals to the Board are also silent on the question of whether the Board itself or its members may appoint others to attend meetings in their stead and thereby exercise their statutory duties. The only

His Excellency, Meldrim Thomson, Jr.

November 10, 1977

Page two

reference to subsequent appointments concerns the "appointment of successors or filling of vacancies for unexpired terms." RSA 187:5, X (Supp. 1975). Since the term of the President of Keene State College on the Board is co-extensive with his term as President, the provisions of subparagraph X, even if applicable to this situation, would not apply. The Board is constituted of 25 members, 13 of whom constitute a quorum for most purposes. RSA 187:5-a, IV (Supp. 1975). This, as well as the absence of any applicable statutory language, suggests that the Legislature did not expect Board members to appoint others to attend in their absence but, rather, that it contemplated absences by members of the Board for which there would be no substitute.

In the absence of legislative authority for an appointment, either by other Board members or by the President of Keene State College, of an individual to act in that President's absence, the question is whether under general principles of law the duty may be delegated. The general rule is that "where the power to be executed involves, necessarily, the exercise of judgment and discretion, it cannot be delegated." Farmers' Mutual Fire Insurance Company v. Chase, 56 N.H. 341 (1876). The duty involved here, the election by the Board of its own chairman, is, we believe, such a non-delegable duty. Any one of the 25 members of the Board could be elected Chairman. The decision of which member to choose would involve considerations of the individual's background, expertise, and administrative and leadership abilities. We believe the duty so to decide necessarily involves the exercise of judgment and discretion and may not, therefore, be delegated to another to perform.

Yours respectfully,

David H. Souter
Attorney General

smg